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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. ~~934~~ 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

R. L. BRYANT, ADMINISTRATOR OF THE ESTATE OF M. L. BRYANT, DECEASED.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

J. M. PERRY,
Counsel for Petitioner.

(34,243)

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R. L. BRYANT, ADMINISTRATOR OF THE ESTATE OF M. L. BRYANT, DECEASED, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable the Supreme Court of the United States:

Your petitioner, The Chesapeake & Ohio Railway Company, a common carrier engaged in interstate commerce, respectfully represents that it is aggrieved by a judgment of the Supreme Court of Appeals of Virginia, the highest court of the State of Virginia in

which a decision can be had, entered on the twenty-first day of March, 1929, in a certain action at law wherein petitioner was plaintiff in error and R. L. Bryant, Administrator of M. L. Bryant, dec'd, was defendant in error, which judgment, by an equally divided court and without opinion, affirmed a judgment of the Circuit Court of Alleghany County, Virginia, for the sum of $8,000, recovered by said Bryant's Administrator against your petitioner.

Summary Statement of the Matter Involved.

M. L. Bryant was a section laborer, employed in work of interstate character by your petitioner, an interstate carrier by railroad. While at work on your petitioner's premises he was dismissed from service by Dodson, your petitioner's section foreman. Immediately thereafter, before Bryant had moved from the place he stood when dismissed, Dodson shot and fatally wounded him.

The principal questions which arise on the record of this cause are: (1) Whether the Federal Employers' Liability Act (35 Stat. 65, U. S. Code, Ch. 2, sec. 51) applies to and governs the relations between the carrier and its employee, quitting work on the carrier's premises because he was dismissed, during the reasonable margin of time necessary to be used in passing from the premises where the work is being done; and (2) the right of such employee's administrator to recover under said statute for a wrongful, and not negligent, injury inflicted upon the intestate by the carrier's employee.

The said M. L. Bryant's administrator instituted this action for damages against your petitioner in the Circuit Court of Alleghany County, Virginia, under the Virginia statutes governing the liability of railroads to employees and death by wrongful act, which statutes permit a recovery for death caused by wrongful act as well as by negligence (see Appendix). Your petitioner, by appropriate pleading, set up as a defense that it was a common carrier by railroad engaged in interstate commerce, that the plaintiff's intestate was employed in such commerce at the time of the commission of the supposed grievance and that the intestate's injury did not result in whole or in part from the negligence of the petitioner's officers, agents or employees (Rec., pp. 22, 25). Thus the suit became one governed exclusively by the Federal Employers' Liability Act (35 Stat. 65, U. S. Code, Ch. 2, sec. 51) if the facts so pleaded were proved.

At the trial of the case in said Circuit Court of Alleghany County it appeared without question that your petitioner was such interstate carrier engaged in interstate commerce and that the intestate immediately prior to his injury was employed in work of interstate character (Rec., pp. 138, 46, 47, 87-88). It was also proved that, as the intestate was placing on a lever car tools he had brought from the petitioner's tool house, his foreman, who was authorized to dismiss employees working under him (Rec., pp. 141, 142) but was without authority to police or guard the petitioner's premises against trespassers (Rec., p. 147), told the in-

testate that he had no more work for him to do. The intestate asked his foreman's reasons and the whereabouts of the regular foreman (Dodson being acting foreman only), to whom he would appeal, whereupon the foreman repeated that he had no work for the intestate to do, ordered him to get away, drew a pistol, aimed it at the intestate and fired, fatally wounding him (Rec., pp. 103-104, 68-69). The whole affair occurred very quickly, and when the first shot was fired the intestate had not moved from where he stood when he was dismissed. There had been some difficulty between the intestate and foreman Dodson on the preceding Saturday—the shooting occurred on Monday—while the section force was engaged in like work. The intestate then had threatened to beat the foreman, the foreman had said, "After this evening remember I don't work you any more," and the intestate had replied, "If you cause me to lose my job I will kill you" (Rec., p. 88). Afterwards, on the same day, at quitting time, foreman Dodson had said to the intestate, "If you keep on yapping around here you won't have anything to do" (Rec., p. 61). Dodson testified that he discharged Bryant on Saturday (Rec., p. 85), but this was a mere conclusion from the facts above set out, was objected to by the defendant on this ground, the objection overruled and exception taken.

Your petitioner demurred to the evidence, especially insisting in its statement of the grounds of its demurrer that the petitioner was engaged and the intestate employed in interstate commerce at the time of the intestate's injury, that said injury did not result in

whole or in part from negligence and that no cause of action had accrued to the plaintiff against petitioner under the statute governing such employment and engagement in interstate commerce (Rec., p. 161). The trial court overruled the demurrer to the evidence and gave judgment against your petitioner, its decision thus being against the right, privilege or immunity under said federal statute, specifically claimed by your petitioner. The defendant excepted.

Under the Virginia practice the effect of a demurrer to the evidence is: "The party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." *Johnson* v. *C. & O. Ry. Co.*, 91 Va. 171, 174; *A. C. L. R. Co.* v. *Wheeler*, 147 Va. 1, 17. The Court, however, is not obliged to accept as true what it knows judicially to be untrue. *N. & W. R. Co.* v. *Strickler*, 118 Va. 153, 155. And a demurrer to the evidence does not waive an objection to illegal or incompetent evidence, admitted over the demurrant's motion to exclude. *N. & W. R. Co.* v. *Warden*, 117 Va. 801, 804.

The Supreme Court of Appeals of Virginia having awarded a writ of error to, and having affirmed said judgment of, the Circuit Court of Alleghany County, by order entered on January 19th, 1928 (Rec., p. 176), delivering an opinion (Rec., p. 163), by order entered

on June 25th, 1928, reheard and set aside its said order of affirmance (Rec., p. 187).

On March 21st, 1929, said Supreme Court of Appeals of Virginia, being "equally divided in opinion as to the judgment to be entered in the premises" (Rec. p. 188), affirmed the judgment of the Circuit Court of Alleghany County but delivered no opinion.

Your petitioner's first assignment of error in its petition for said writ of error was (Rec., p. 4):

> "The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

In its petition to rehear the said order of the Supreme Court of Appeals of Virginia entered on January 19th, 1928, affirming the judgment of the Circuit Court of Alleghany County (which judgment was set aside upon said petition), your petitioner again insisted that—

> "Your petitioner shows that under the evidence and the opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interstate commerce and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission or ommission negligently done.
>
> "And your petitioner submits that it has been

> deprived in this respect of its rights and immunities under said federal statute" (Rec., Petition for Rehearing, p. 181).

and that—

> "The defendant under the pleadings and proof in this case had the right to insist and insists that its relations to the intestate were and are governed exclusively by the Federal Employers' Liability Act and that in imposing liability upon it for the death of said intestate it has been and is deprived of its rights and immunities under said federal statutes" (Rec., Petition for Rehearing, p. 181).

Reasons Relied on for the Allowance of the Writ.

1. This Court has held that "employment includes not only the actual doing of the work but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done" (*Bountiful Brick Co.* v. *Giles,* 276 U. S. 154, 158), and, in the case of an employee in charge of a switch engine, who had left his engine at the place where it was to remain for the night and was leaving the carrier's yard when he was struck by an engine and fatally wounded, where the question was whether under these circumstances the deceased was employed in interstate commerce at the time of his injury, that "in leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co.* v. *Zachary,* 232 U. S. 248, 260. Like his trip through the yard to

his engine in the morning it was a necessary incident of his day's work * * *."

This incident of the contract of employment—the right to the necessary time for passing from the employer's premises—must be present whenever the completion of his work finds the employee on the master's premises, whether his task is ended because of the close of the day, or because a particular piece of work is finished, or because of his discharge from service.

In the case just cited it was distinctly held (244 U. S. 170, 173) that this necessary incident of the employment partook of the character of the work done during the day of the injury, and since a part of that work was interstate in character it was plain that as the employee passed from his place of work through the carrier's yard he was employed in interstate commerce. In this case, therefore, since the intestate's employment was in interstate commerce when he received the order of dismissal, the relations between your petitioner and the intestate when he was injured before he left its premises were governed by the Federal Employer's Liability Act and the Supreme Court of Appeals of Virginia should have so held.

2. This Court repeatedly has held that a railroad company is not liable to make compensation under the Federal Employers' Liability Act, because of the wilful murder of one of its employees by another employee.

Davis v. *Green*, 260 U. S. 349;

Atlantic Coast Line R. Co. v. *Southwell*, 275 U. S. 64.

3. The Supreme Court of Appeals of Virginia was equally divided in opinion and consequently affirmed, on March 21st, 1929, the judgment of the Circuit Court of Alleghany County. No opinion was handed down with its said judgment and the reasons of the Justices of said Court who were for affirming the judgment of the trial court do not appear.

There is little need to comment upon the opinion of the State Court (Rec., p. 163) handed down with its judgment of affirmance of January 19th, 1928, which judgment was set aside on June 25th, 1928, since certainly one-half of the justices of the court did not concur therein when on March 21st, 1929, the judgment of the trial court was affirmed, without opinion, by an equally divided court.

In the opinion referred to the court held that petitioner's foreman discharged the intestate on the preceding Saturday, not on the Monday of the shooting; that the foreman on Monday as incident to his authority to dismiss, had the implied authority to expel from the master's premises, with reasonable force, an employee who did not leave when dismissed, and that he thus was acting within the scope of his employment in requiring the intestate to leave; and that (Rec., p. 170-171), "when Bryant went to the toolhouse on Monday morning he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there he said that he expected Dodson would discharge him. * * * Under these circumstances Bryant can not be said to have been a trespasser in going to the toolhouse, but he became such

when informed of his prior dismissal and refused to leave."

The purpose of this reasoning was to avoid the application of the Federal Employers' Liability Act, but obviously even the case stated by the opinion is one within that statute.

If a discharged servant returns to the master's premises, after leaving them upon his discharge, he comes as a trespasser (39 *Corpus Juris*, p. 91, sec. 94); if the intestate's discharge had been complete on the preceding Saturday he must have been a trespasser in returning on Monday. But to regard and treat him as a trespasser, in coming to or being at work upon the carrier's premises on the morning of the shooting, would have forbidden any recovery under the state law, because of the unimpeached, uncontradicted evidence that the foreman had no authority to expel trespassers or to police the tracks (Rec. p. 147)—to the benefit of which evidence the petitioner was entitled under the rule governing a demurrer to the evidence which put the foreman's act outside of the scope of his employment if the foreman was dealing with a trespasser coming upon petitioner's premises. Hence the especial materiality of the finding that the intestate "cannot be said to have been a trespasser in going to the toolhouse" (Rec., p. 171), and that such status continued "until he was informed of his prior dismissal and refused to leave," whereupon he became a trespasser. The court thus necessarily held, notwithstanding the positive declaration that Bryant was discharged on Saturday, that as an incident to the in

testate's employment he had the right to return to the premises on Monday.

Granting, as held in the opinion, that the foreman, with express authority to dismiss the intestate, had the implied authority to require him to leave the premises; that implied authority could not and did not militate against the discharged employee's right, incident to the employment, to the reasonable margin of time necessary to go from the employer's premises in safety. Such implied authority and the employee's right are reciprocal and coextensive. If the implied authority to expel could be exercised, as the opinion holds, upon the foreman informing the intestate of his prior dismissal—it is not to be resurrected from the happenings of two days before—nevertheless the intestate was still entitled to that necessary incident of his employment and was not a trespasser. Thus again the federal question was presented and decided: Whether a carrier's employee engaged in interstate work on its premises becomes a trespasser when informed that he has been discharged, or is he entitled as incident to his employment to the reasonable margin of time necessary to be used in leaving the carrier's premises, during which the federal statute applies. The decision was against the application of the said statute.

The effect of the judgment entered March 21st, 1929, is however, to hold (*a*) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the

employee's work there is finished, does not exist if the employee is leaving the work permanently, or (*b*) that such necessary incident of the employment does not partake of the character, interstate or intrastate, as the case may be, of the work just done, or (*c*) that recovery may be had under said federal statute against the carrier for the intestate's injury, wilfully, and not negligently inflicted by another employee.

4. The said state court thus has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way not in accord with applicable decisions of this Court.

It therefore appears that in said cause your petitioner claimed and especially set up a right, privilege or immunity under a statute of the United States, namely, the act entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees," approved April 22nd, 1908 (35 Stat. 65, U. S. Code, Ch. 2, sec. 51), and the decision was against such right, privilege or immunity and also in conflict with the decisions of this Court, as will appear from the decisions in the cases cited above, namely:

Bountiful Brick Co. v. *Giles,* 276 U. S. 154, 158;
Erie R. Co. v. *Winfield,* 244 U. S. 170, 173;
Davis v. *Green,* 260 U. S. 349;
Atlantic Coast Line R. Co. v. *Southwell,* 275 U. S. 64.

Your petitioner files herewith as an exhibit hereto a certified copy of the entire transcript of the record

of said case, including the proceedings in the Supreme Court of Appeals of Virginia.

Your petitioner submits that the questions herein involved are of such general interest and importance as to warrant this Court in reviewing them.

Therefore your petitioner respectfully prays that a writ of certiorari may issue, directed to the Supreme Court of Appeals of Virginia, commanding it to certify its record herein to this Court for review and determination by it; that a writ of supersedeas may issue to the judgment aforesaid; that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of Appeals of Virginia may be reversed by this honorable Court.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

By J. M. PERRY,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

No opinion was delivered by the Supreme Court of Appeals of Virginia in entering its judgment March 21st, 1929, affirming the judgment of the Circuit Court of Alleghany County, the Court being equally divided in opinion as to the judgment to be entered in the premises.

That Court delivered an opinion when it entered its first judgment in the cause on January 19th, 1928, afterwards reheard and set aside by its order entered June 25th, 1928, but the opinion referred to was not officially reported, nor printed in any unofficial reporter. It appears at p. 163 of the record accompanying the petition.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is March 21st, 1929 (Rec., p. 188).

2. The specific claims advanced, and rulings made, in the said Supreme Court of Appeals of Virginia, which are relied upon as the basis of this Court's jurisdiction, are:

In its petition for a writ of error to the judgment of the Circuit Court of Alleghany upon which said writ

was awarded the first assignment of error by the Chesapeake & Ohio Railway Company, petitioner, was (Rec., p. 4):

> "The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

In its petition to rehear the judgment of January 19th, 1928, which petition was entertained, your petitioner again urged the said assignment of error (Rec., p. 181 and Rec., p. 180), and that

> "Under the evidence and opinion of the Court in this respect Bryant was entitled, as an employee to a reasonable opportunity to leave the premises, that he was employed in interstate commerce, and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission and omission negligently done, and your petitioner submits that it has been deprived in this respect of its rights and immunities under said Federal statute" (Rec., p. 181).

Although the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia by a divided court and without opinion, a controlling federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to defeat any recovery (Rec.,

pp. 22, 161); its proof was that it was engaged in interstate commerce and that the intestate just before his injury was in interstate employment (Rec., pp. 138, 87-8) and its assignments of error in the state court explicitly set up its immunity under said federal act (Rec., pp. 4, 181). The judgment of the Supreme Court of Appeals of Virginia was against the right, privilege or immunity assured to and so claimed by your petitioner under the federal statute, and was in conflict with the decisions of this Court in the cases just above cited.

The review of this judgment is sought by your petitioner under the provisions of the Judicial Code, sec. 237, as amended by the Act of February 13, 1925, U. S. Code, Sec. 344 (*b*).

The following cases are believed to sustain the jurisdiction of this Court:

Toledo, St. L. & W. R. Co. v. *Slavin,* 236 U. S. 454;

Davis v. *Green,* 260 U. S. 349, 352.

III.

Statement of the Case.

On the Monday morning of the shooting the section force had brought their lever car from petitioner's tool house, had placed it on the main track and were loading their tools on it (Rec., pp. 45-47). The intestate began work, going to the tool house to bring out tools (Rec., pp. 46, 57-58, 103-104). As he went the foreman, Dodson, said, "I ain't going to work you any

more" (Rec., p. 103), or, "Fellow, I don't need you any longer" (Rec., p. 46). The intestate evidently did not hear or did not understand, but went into the tool house, brought out tools and placed them on the lever car (Rec., pp. 46, 103). Dodson then repeated, "I don't need you any longer", to which the intestate replied, "I am due to get my money in six hours after I quit", and, "I will go to see Mr. Long", who was the regular foreman (Rec., pp. 46, 53, 58, 67). Dodson then said, "I have just fooled with you long enough, you get away from here", drew a pistol and aimed it at the intestate (Rec., pp. 46, 53, 58, 67, 104), who said, "What are you going to do with that?" "I am going to make you eat it" (Rec., pp. 46, 53, 68, 104). The intestate did not attempt to attack the foreman, had nothing in his hands, made no effort to draw any weapon and made no advance towards the foreman, but was shot in his tracks (Rec., pp. 48, 58-59, 104-105). Dodson's firing commenced when the intestate said that he would make Dodson eat the pistol (Rec., pp. 46, 53, 55, 68). The whole thing happened very quickly (Rec., pp. 72, 104).

This was on Monday. On the previous Saturday afternoon Bryant threatened to beat Dodson, the latter deposed, and Dodson said, "Remember after this evening I don't work you any more", to which Bryant replied, "If you cause me to lose my job I will kill you" (Rec., p. 88). Another one of the plaintiff's witnesses testified that an hour or more afterwards, at quitting time on Saturday, foreman Dodson said to the intestate, "If you keep on yapping around here

you won't have anything to do'' (Rec., p. 61), and as the intestate went to work on Monday morning he had told a friend that he expected to be dismissed by Dodson that morning (Rec., p. 118-119).

Your petitioner demurred to the evidence in the trial court, insisting upon the application of the Federal Employers' Liability Act and its immunity thereunder (Rec., pp. 159-161). The trial court overruled the demurrer to the evidence and gave judgment in favor of the plaintiff against your petitioner, the defendant, for $8,000, the damages assessed by a jury (Rec., p. 26).

To the said judgment of the Circuit Court of Alleghany County the Supreme Court of Appeals of Virginia awarded a writ of error (Rec., p. 19). On January 19th, 1928, the Court affirmed the judgment of the trial court (Rec., p. 176). Your petitioner filed its petition for a rehearing (Rec., p. 177), which petition was entertained by the Court (Rec., p. 186). On March 28th, 1928, the said Court denied a rehearing (Rec., p. 186), but on the next day, March 29th, 1928, set aside and annulled its said order and judgment denying a rehearing (Rec., p. 186), and on June 25th, 1928, the said Court set aside its judgment of January 19th, 1928, and granted a rehearing (Rec., p. 187). Thereafter, on March 21st, 1929, being equally divided in opinion, a judgment was entered affirming the said judgment of the Circuit Court of Alleghany County, no opinion being delivered (Rec., p. 188).

IV.

Specification of Errors.

1. The Supreme Court of Appeals of Virginia erred in affirming the said judgment and thus in effect holding, (*a*) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the employee's work there is finished, does not exist if the employee is leaving the work permanently, or (*b*) that such necessary incident of the employment does not partake of the interstate character of the work being done.

2. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the pleadings and proof in this case the intestate was not employed in interstate commerce at the time of his injury, and that the petitioner's relations to the intestate were not governed exclusively by the Federal Employers' Liability Act.

3. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the Federal Employers' Liability Act the intestate may recover damages against your petitioner for the wrongful death of the intestate at the hands of another employee.

V.

ARGUMENT.

The Decision Below Is Contrary to and in Conflict with Prior Federal Decisions.

The State court, in affirming the trial court and thus sanctioning the plaintiff's recovery of damages against your petitioner, necessarily decided that the case was outside of the Federal Employers' Liability Act, either because:

(*a*) The incident of employment, the right to a reasonable margin of time necessary to be used to leave the carrier's premises after the employee's work there is finished, in the opinion of the Court does not exist if the employee is leaving the work permanently; or

(*b*) Such incident of the employment in the opinion of the Court does not partake of the interstate character of the work just done;

Or, in affirming the trial court, the State court was of opinion that recovery may be had under said Federal statute against the carrier for the intestate's injury, wilfully, and not negligently inflicted by another employee.

It is submitted that the view of the State court in either of the alternatives stated was directly in conflict wih the decisions of his Court, as thus appears:

1. The petitioner was a carrier by railroad engaged in interstate commerce (Rec., p. 138); the work to be

done by its section force, including the intestate, on the day of his injury was in the maintenance of petitioner's main line (Rec., pp. 87-88). The employment was interstate in character, although petitioner's employees then were merely preparing to go to the place where the actual task was to be performed, and the Federal Employers' Liability Act applied.

New York Central R. Co. v. *Winfield*, 244 U. S. 147;

New York Central R. Co. v. *Porter*, 249 U. S. 168;

Kinzell v. *C. & St. P. R. Co.*, 250 U. S. 130;

Pedersen v. *D., L. & W. R. Co.*, 229 U. S. 446.

2. After his discharge the petitioner was entitled, as an incident of his employment, to a reasonable margin of time necessary to be used in passing from the petitioner's premises where the work was being done and the discharge effected, during which time the duties of master to servant persisted.

Erie R. Co. v. *Winfield*, 244 U. S. 170, 173;

Bountiful Brick Co. v. *Giles*, 276 U. S. 154, 158.

While the decision of this Court in the case of *Erie* v. *Winfield, supra*, was in the case of an employee who had completed his work, not because he was discharged, but because the day was ended, the principle enunciated cannot be affected by the employee's reason for leaving. It is necessarily applicable where work is not to be resumed, whether because of a discharge while at work, or because the task for which

the laborer is hired is completed, or where the employee expects to return after his night's rest.

The intestate was wounded by petitioner's foreman immediately after being discharged. In fact, the discharge and the shooting were almost simultaneous (Rec., pp. 82, 72). "There wasn't but merely a moment, you might say" (Rec., p. 82). "The whole transaction happened very quickly" (Rec., p. 72).

3. This incident of the employment partook of the character of the work done that day, the making of repairs to and maintaining the interstate carrier's main line, and the intestate's employment necessarily was in interstate commerce. It is plain, therefore, that the intestate was employed in interstate commerce when he was wounded, even though he had received his discharge, and the Federal Employers' Liability Act exclusively applied to and controlled the relations between the intestate and the carrier, your petitioner.

Erie R. Co. v. *Winfield,* 244 U. S. 170, 173.

4. The intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees, but from a wilful wrong, and there can be no recovery under the Federal Employers' Liability Act for an injury so inflicted.

Davis v. *Green,* 260 U. S. 349;

Atlantic Coast Line R. Co. v. *Southwell's Admr.,* 275 U. S. 64.

The Court's very hesitation in the case emphasizes the propriety of a review. It first affirmed the judg-

ment of the trial court by the order of January 19th, 1928 (Rec., p. 176). A petition for rehearing was filed and by order entered on March 28th, 1928, it denied a rehearing (Rec., p. 186). On March 29th, 1928, it set aside and annulled the order refusing a rehearing and took further time to consider (Rec., p. 186). On June 25th, 1928, the Court set aside its former judgment of affirmance (Rec., p. 187), and on March 21st, 1929, it affirmed the trial court by a divided court and without opinion (Rec., p. 188).

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Appeals of Virginia and finally reverse it.

Respectfully submitted,

J. M. PERRY,
Counsel for Petitioner.

APPENDIX.

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, * * * and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* * * * and to recover damages in respect thereof, then and in every such case the person who, or the corporation * * * which, would have been liable, if death had not ensued, shall be liable to an action for damages * * *, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Virginia Code of 1919, Section 5786.

"Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while he is employed by such carrier in such commerce, and in case of his death, to his personal representative, for such injury or death, resulting in whole or in part from the wrongful act or neglect of any of the officers, agents, servants or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. If the action be for the death of an employee, sections 5787, 5788, 5789 and 5790 shall apply thereto as far as applicable. No action shall be maintained under this section, unless it be commenced within one year from the day the cause of action accrued.

Virginia Code 1919, Section 5791.

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CHARLES ELMOR

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Brief for the Chesapeake & Ohio Railway Company, Opposing Respondent's Motion to Dismiss

J. M. PERRY,
For the Petitioner,
Staunton, Virginia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Dec'd, Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR PETITIONER, UPON RESPONDENT'S MOTION TO DISMISS

I.

THE OPINIONS OF THE COURTS BELOW

No opinion was delivered by the Supreme Court of Appeals of Virginia in entering its judgment here under review on March 21, 1929, affirming, by a divided court, the judgment of the Circuit Court of Alleghany County.

The Supreme Court of Appeals of Virginia delivered an opinion when it entered a first judgment in the cause January 19, 1928, which judgment it afterwards reheard and set aside by its order entered June 25, 1928 (Rec., p. 187). The opinion re-

ferred to was not officially reported, nor has it been printed in any unofficial reporter. It appears at p. 163 of the record here.

II.

THE JURISDICTION OF THIS COURT

1. The date of the judgment to be reviewed is March 21, 1929 (Rec., p. 183), affirming, by a court equally divided in opinion, a judgment of the Circuit Court of the County of Alleghany, Virginia, in favor of the respondent, plaintiff below, against the petitioner for $8,000 damages (Rec., p. 26).

2. The specific claims advanced, and rulings made, in the said Supreme Court of Appeals of Virginia, which are relied upon as the basis of this Court's jurisdiction, are:

In its petition for a writ of error to the judgment of the Circuit Court of Alleghany upon which said writ was awarded, the first assignment of error by The Chesapeake & Ohio Railway Company, petitioner, was (Rec., p. 4):

"The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents, or employees."

In its petition for a rehearing, upon which the judgment of January 19, 1928, was set aside, your

petitioner again urged the said assignment of error (Rec., pp. 181, 180), and that

"Under the evidence and opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interstate commerce, and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission and omission negligently done, and your petitioner submits that it has been deprived in this respect of its rights and immunities under said Federal statute."

Although the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia by a divided court and without opinion, a controlling Federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to defeat any recovery (Rec., pp. 22, 161); the proof was that it was engaged in interstate commerce and that the work being done by the intestate just before his injury was interstate in character (Rec., pp. 138, 87-88) and its assignments of error in the state court explicitly set up its immunity under said Federal act (Rec., pp. 4, 181). The judgment of the Supreme Court of Appeals of Virginia was against the right, privilege or immunity assured to and so claimed by your petitioner under the Federal statute, and was in conflict, it is believed, with the decisions of this Court in the following cases.

Bountiful Brick Co. v. Giles, 276 U. S. 154, 158;

Erie R. Co. v. Winfield, 244 U. S. 170, 173;

Davis v. Green, 260 U. S. 349;

Atlantic Coast Line R. Co. v. Southwell, 275 U. S. 64.

3. The petitioner, The Chesapeake & Ohio Railway Company, filed its petition for a writ of certiorari under the provisions of sec. 237 of the Judicial Code as amended by the Act of February 13, 1925, United States Code, sec. 334(b), and said petition was granted by this Court June 3, 1929.

4. The following cases are believed to sustain the jurisdiction of this Court:

Toledo St. L. & W. R. Co. v. Slavin, 236 U. S. 454;

St. Louis I. M. & S. R. Co. v. McWhirter, 299 U. S. 265;

Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573;

Johnson v. Risk, 137 U. S. 300.

North Carolina R. R. Co. v. Zachary, 232 U. S. 248;

Davis v. Green, 260 U. S. 349, 352;

III.

ASSIGNMENTS OF ERROR

In its brief accompanying its petition for certiorari petitioner made the following assignments of error:

1. The Supreme Court of Appeals of Virginia erred in affirming the said judgment and thus in effect holding, (a) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the employee's work there is finished, does not exist if the employee is leaving the work permanently, or (b) that such necessary incident of the employment does not partake of the interstate character of the work being done.

2. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the pleadings and proof in this case the intestate was not employed in interstate commerce at the time of his injury, and that the petitioner's relations to the intestate were not governed exclusively by the Federal Employers' Liability Act.

3. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the Federal Employers' Liability Act the intestate may recover damages against your petitioner for the wrongful death of the intestate at the hands of another employee.

IV.

THE QUESTION HERE

The petitioner opposes respondent's motion to dismiss the writ of certiorari heretofore granted, the ground stated in the motion being (Respond-

ent's Motion, p. 3) that the jurisdiction of the Court depends upon a question of fact, which respondent claims was passed upon and settled by the state court against petitioner, namely, whether or not the respondent's intestate, M. L. Bryant, was employed by the petitioner in interstate commerce when he was fatally injured.

STATEMENT OF THE CASE

In view of the ground of the motion to dismiss it is necessary to set forth in some detail the proceedings in the state courts, and, briefly, the material facts.

(1) Proceedings in the State Court:

The suit was to recover damages for the alleged wrongful death of respondent's intestate, M. L. Bryant, brought under the Virginia statutes which permit recovery for death caused by wrongful act as well as by negligence (Code of Virginia, 1919, secs. 5791, 5786—see Appendix), the declaration specifically averring that the deceased was about his work as petitioner's servant when petitioner's foreman discharged him, and that when the deceased did not leave the premises immediately the foreman shot him (Rec., pp. 19-21). The petitioner pleaded generally (Rec., p. 21) and filed a special plea that it was a common carrier by railroad engaged in interstate commerce, that the intestate was employed by it in such commerce, and that his death did not result from the negligence of any of its officers, agents, or employees. The respondent

filed a replication (Rec., p. 25) denying that the intestate was in petitioner's employment when injured and that he was employed in interstate commerce.

At the trial the petitioner demurred to the evidence, and, as required by statute (Code of Virginia, 1919, sec. 6117—see Appendix), stated in writing specifically the grounds relied on, and therein petitioner especially insisted that it was engaged and the intestate employed in interstate commerce at the time of the intestate's injury, that his injury did not result in whole or in part from negligence and that no cause of action had accrued to the plaintiff under the statute governing such employment and engagement in interstate commerce (Rec., p. 161). The trial court overruled petitioner's demurrer to the evidence and gave judgment against it. The petitioner excepted (Rec., p. 26).

Under the Virginia practice the effect of a demurrer to the evidence is: "The party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." Johnson v. C. & O. Ry. Co., 91 Va. 171, 174; A. C. L. R. Co. v. Wheeler, 147 Va. 1, 17. The Court, however, is not obliged to accept as true what it knows judicially to be untrue. N. & W.

R. Co. v. Strickler, 118 Va. 153, 155. And a demurrer to the evidence does not waive an objection to illegal or incompetent evidence, admitted over the demurrant's motion to exclude. N. & W. R. Co. v. Warden, 117 Va. 801, 804.

The Supreme Court of Appeals of Virginia upon writ of error first affirmed the judgment by order entered on January 19, 1928 (Rec., p. 176), delivering an opinion (Rec., p. 163), but afterwards on June 25, 1928, reheard and set aside its judgment (Rec., p. 187), and on March 21, 1929, said Supreme Court of Appeals of Virginia, being equally divided in opinion, affirmed the judgment of the Circuit Court of Alleghany County (Rec., p. 188), delivering no opinion.

(2) Summary statement of facts:

Bryant, the deceased, was a section laborer, employed for some years by petitioner, an interstate carrier by railroad (Rec., pp. 88, 138). While the deceased was doing work of interstate character on petitioner's premises on Monday, August 31, your petitioner's acting foreman Dodson told him he did not need him any longer (Rec., pp. 46, 53, 72, 103), but the deceased did not hear the foreman and went on with his work (Rec., pp. 146, 103). The foreman repeated his words of dismissal, with emphasis, and immediately thereafter, before Bryant had moved from the place he stood, Dodson shot and fatally wounded him (Rec., 46, 53, 57, 67, 104). The whole affair happened very quickly (Rec., pp. 72, 104).

There had been some difficulty between the intestate and the foreman on the preceding Saturday while the section force was engaged in like work. The intestate then had threatened to beat the foreman; the foreman had said, "After this evening remember I don't work you any more," and the intestate had replied, "If you cause me to lose my job I will kill you" (Rec., p. 88). Afterwards on the same day, at quitting time, Foreman Dodson threatened to discharge Bryant, saying to him, "If you keep on yapping around here you won't have anything to do" (Rec., p. 61).

Dodson testified that he discharged Bryant on Saturday (Rec., p. 85) but this was solely the witness' conclusion from the facts above set out, was objected to by the petitioner on this ground, the objection was overruled, and exception was taken.

The foreman had no authority to expel trespassers or to police petitioner's tracks (Rec., p. 147).

ARGUMENT

Summary of the Argument

Point I—The State court did not make any finding of facts as claimed by the respondent in his motion to dismiss.

Point II—This Court has complete jurisdiction to review and dispose of this action upon its own findings of fact and law.

Point III—The ground upon which respondent asserts that the judgment of the state court was

based is in substance and effect the decision of a Federal question, and the denial of the Federal right claimed by petitioner; otherwise there was no good and valid ground, sufficient of itself to sustain the judgment.

Point IV—The petitioner has not admitted, as claimed by respondent, that the intestate was not in its employment when the shooting occurred.

Point I.

The State court did not make any finding of facts, as claimed by the respondent in his motion to dismiss.

The judgment of March 21, 1929 (Rec., p. 188), was the affirmance of the judgment of the trial court by an equally divided court. No opinion was delivered and no facts were found.

The judgment of the Circuit Court of Alleghany County (Rec., p. 26) was general, overruling the demurrer to the evidence and for the damages assessed by the jury. There was no finding of facts whatever.

The repeated references in the respondent's brief to the opinion of the Supreme Court of Appeals of Virginia are to the opinion delivered with the first judgment of the State Court (Rec., p. 176), afterwards reheard and set aside (Rec., p. 187)—a nullity. The opinion of Judge Burks delivered with that judgment (Rec., p. 163) fell with the judgment and is not a finding of facts supporting the judgment here under review.

Point II.

This Court has complete jurisdiction to review and dispose of this action upon its own findings of fact and law.

The jurisdiction of the Court herein is based upon the fact that the judgment of the State court denied petitioner, an interstate carrier, a right and immunity especially claimed by it under the Federal Employers' Liability Act, the right to be shielded from liability for damages for an injury sustained by its interstate employee, not occasioned by the negligence of itself, its officers, agents, or employees.

In the case of North Carolina R. R. Co. v. Zachary, 232 U. S. 248, the State court had held that the deceased at the time he was killed was not in fact employed in interstate commerce, and it was insisted here that there was no evidence tending to show that he was engaged in such commerce. This Court said of that contention (p. 258):

> "But it is now insisted that there was no evidence tending to show that deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal rights, Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611, and cases cited."

In Kansas City Southern R. Co., v. C. H. Albers Commission Co., 223 U. S. 573, 591, it was said:

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal rights set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

Again, in St. Louis I. M. & R. Co. v. McWhirter, 229 U. S. 265, 277, it was said:

> "While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat., sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 591; Creswill v. Grand Lodge, K. P., 225 U. S. 246."

The respondent's declaration sought a recovery upon the specific averment that the relation of

master and servant existed on the day of the shooting and that the deceased was then doing the work he was employed to do (Rec., p. 19).

It appeared from the evidence at the trial, without contradiction, that petitioner was an interstate carrier by railroad (Rec., 88, 138) and that the deceased was actually doing work of interstate character on petitioner's premises on the day of the shooting when petitioner's acting foreman told him that he had no more work for him to do (Rec., pp. 46, 53, 73, 103); that the deceased did not hear the foreman and continued to work (Rec., pp. 146, 103); and that the foreman then repeated the dismissal and immediately thereafter shot and fatally wounded the deceased (Rec., pp. 46, 53, 57, 67, 104).

Clearly a Federal question was passed upon and decided by the State court in permitting a recovery regardless of these circumstances which compel the application of the Federal statute.

Point III.

The ground upon which respondent asserts that the judgment of the state court was based, is in substance and effect the decision of the Federal right claimed by petitioner; otherwise there was no good and valid ground sufficient of itself to sustain the judgment.

The only opinion in this case was that of Judge Burks, handed down January 19, 1928, in support of the judgment afterwards reheard and set aside. Certainly one half of the justices of the Court did

not adhere thereto when on March 21, 1929, the judgment of the trial court was affirmed by the court equally divided in opinion. But the respondent in his brief in support of his motion to dismiss repeatedly refers to that opinion and seeks to infer from it the existence of some valid non-Federal ground upon which the subsequent affirmance of the trial court might have been based.

In that opinion it is said that petitioner's foreman discharged the intestate on the preceding Saturday, that the foreman two days afterwards on Monday, as incident to his authority to dismiss, had the implied authority to expel from the master's premises, with reasonable force, an employee who did not leave when dismissed, and when on Monday he informed deceased that he had been discharged, he thus was acting within the scope of his employment in requiring the intestate to leave the premises. But the opinion further held (Rec., pp. 170-171) that "when Bryant went to the tool house on Monday morning he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there he said that he expected that Dodson would discharge him. . . . **Under these circumstances Bryant cannot be said to have been a trespasser in coming to the tool house, but he became such when informed of his prior dismissal and refused to leave."** (Italics supplied.)

The purpose of this reasoning was to avoid the application of the Federal Employers' Liability Act, but obviously even the case stated by the

opinion is within that statute. The opinion necessarily held that as an incident of the intestate's employment he had the right to return as an employee to the premises on Monday.

If a discharged servant returns to the master's premises, after leaving them upon his discharge, he comes as a trespasser (39 Corpus Juris, p. 91, sec. 94). On the preceding Saturday the deceased left the petitioner's premises when his work was done. If his discharge had been complete on that day he must have been a trespasser in returning on Monday. Yet to regard him as a trespasser, in coming to or being at work upon the carrier's premises on the morning of the shooting, would have forbidden any recovery under the state law, because of the unimpeached, uncontradicted evidence that the foreman had no authority to expel trespassers or to police the tracks (Rec., p. 147)—to the benefit of which evidence the petitioner was entitled under the rule governing a demurrer to the evidence (Johnson v. C. & O. Ry. Co., 91 Va. 171, 174, supra)—which evidence put the foreman's act outside of the scope of his employment, if he was dealing with a trespasser coming upon petitioner's premises. His only authority, as foreman, had been fully exercised two days before, and could not again be exercised except as to an employee. Hence the especial materiality of the finding that the intestate "cannot be said to have been a trespasser" in coming to and being at work (Rec., p. 171) and that he was not a trespasser "until he was informed of his

prior dismissal and refused to leave," whereupon he became a trespasser.

Assuming, as held in this opinion, that the foreman, with express authority to dismiss the deceased, had the implied authority to require him to leave the premises upon informing him of his discharge, the exercise of such implied authority could not and did not deprive the discharged employee of his right, incident to the employment, to the reasonable margin of time necessary to leave the employer's premises in safety. The foreman's implied authority and the employee's right are reciprocal and co-extensive. If, as the opinion holds, the foreman could exercise the implied authority to expel as incident to his informing the intestate that he had been dismissed, nevertheless the intestate was still entitled to that necessary incident of his employment, and his relation to his employer was still controlled by the Federal act.

Thus, again, the Federal question was presented and decided: Whether a carrier's employee doing interstate work on its premises becomes a trespasser when informed that he has been discharged, or is he entitled as incident to his employment to the reasonable margin of time necessary to be used in leaving the carrier's premises, during which the Federal statute applies. This opinion held that the deceased became a trespasser immediately upon being informed of his discharge; and was against the application of the Federal statute.

It is said in the case of Johnson v. Risk, 137 U. S. 300, 307:

> "Where there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court when decided, we ought not to assume that it proceeded on ground clearly untenable."

If, as contended by respondent, the deceased was completely discharged on Saturday, two days before the Monday of the shooting, as and after he left petitioner's premises on Saturday he was a stranger, with whom the petitioner had no contractual relation whatever. When he came upon petitioner's premises two days later and was shot, he came as a stranger and a trespasser.

It is elementary that to impose liability upon the master for its servant's assault upon such stranger, the servant's act must be shown to have been within the scope of his employment. Where, as here is proved to be the case, the servant had no authority to police the tracks or to expel trespassers, his assault upon the deceased, a stranger and under the law a trespasser, was clearly beyond the

scope of his employment, a tort for which the petitioner could not be held liable.

The statement of respondent's brief (p. 7) that the plaintiff "assumed when he brought his suit that Bryant was not an employee of the defendant when the mischief happened," if intended to imply that the deceased was not an employee on the morning of the shooting, is best answered by reference to the express averments of his declaration (Rec., pp. 19-20) that the deceased, as the petitioner's servant, had begun his day's work where he was employed to work, and was doing what he was employed to do, when the petitioner's foreman directed him to stop work and to leave the employment and when he did not leave the premises immediately, shot him.

These circumstances do not afford a good and valid ground, independent of the Federal question involved in the case, sufficient of itself to sustain the judgment.

Point IV.

The petitioner has not admitted, as claimed by respondent, that the intestate was not in its employment when the shooting occurred.

At p. 13 of the respondent's brief in support of his motion, it is said that "the defendant admitted in its demurrer to the evidence that Bryant was not in its employment when the shooting occurred. It is very true that this admission was made in defendant's grounds of demurrer to the evidence, but

grounds of demurrer to the evidence are part of the demurrer itself."

Under the Virginia statute (Code of Virginia, 1919, sec. 6107—see Appendix) "the defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary." . . . Not only are inconsistent pleas permitted and without prejudice to the defendant, but in trying one plea the Court cannot look to the existence of the other (Norfolk Hosiery, Etc., Co. v. Ætna Hosiery Co., 124 Va. 221, 234).

The Virginia statute (Code of Virginia, 1919, sec. 6117—see Appendix) provides that a party tendering a demurrer to the evidence shall "state in writing specifically the grounds of demurrer relied on and the demurree shall not be compelled to join in said demurrer until such grounds have been so stated"—provisions similar to the statutory requirement (Virginia Code, 1919, sec. 6115) that the party demurring to a pleading may be required to state specifically the grounds of demurrer relied upon.

The demurrant must specify every ground upon which he may rely in support of his demurrer to the evidence, and the Court will not consider any ground not thus pointed out (Davis v. Ellis' Admx., 146 Va. 366, 382, and cases cited). The object of the statute was to require the demurrant to give notice in writing of the grounds of demurrer or causes of demurrer which he intends to rely on, and to prevent him from assigning grounds of demurrer in the appellate court wholly different from

those relied on in the trial court (McMenamin v. Southern R. Co., 115 Va. 822, 824). Even assuming that the respondent is correct in his contention that the grounds stated in connection with a demurrer to the evidence are a pleading, the statutory provision that a defendant may plead as many several matters, whether of law or fact, as he shall think necessary, expressly permits stating inconsistent or repugnant grounds and precludes treating the statement of one ground as a waiver of another.

The petitioner has made no such admission.

CONCLUSION

This Court has complete jurisdiction to review and dispose of this action, for the judgment of the State court necessarily involved and disposed of adversely to petitioner the Federal right it claimed.

Respectfully submitted,

J. M. PERRY,
Counsel for Petitioner,
Staunton, Virginia.

APPENDIX

Virginia Code, 1919, sec. 5791, concerning liability of railroads to employees:

"Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while he is employed by such carrier in such commerce, and in case of his death, to his personal representative, for such injury or death, resulting in whole or in part from the wrongful act or neglect of any of the officers, agents, servants, or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. If the action be for the death of an employee, sections 5787, 5788, 5789, and 5790 shall apply thereto as far as applicable. No action shall be maintained under this section, unless it is commenced within one year from the day the cause of action accrued."

Extract from Virginia Code, 1919, sec. 5786, concerning damages for death by wrongful act:

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, . . . and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed **in rem** . . . and to recover damages in respect thereof, then and in every such case the person who, or the corporation . . . which,

would have been liable, if death had not ensued, shall be liable to an action for damages . . . , notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Virginia Code, 1919, sec. 6117, concerning demurrer to evidence; grounds to be stated.

"The party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be compelled to join in said demurrer until such grounds have been so stated, nor shall any ground of demurrer not thus specifically stated be considered; but the court shall allow the demurree to withdraw his joinder in such demurrer and introduce new evidence, or suffer a non-suit, at any time before the jury retire from the bar. The demurrant shall also be permittted to withdraw his demurrer within the same time."

Virginia Code, 1919, sec. 6107, permitting defendant to plead several matters:

"The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but the issues on the pleas in abatement shall be first tried, and if such issues be found against the defendant, he may,

nevertheless, make any other defenses he may have to the action. Special pleas constituting a good defense shall not be rejected because provable under the general issue."

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CHARLES ELMORE
CL

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

Brief for the Chesapeake and Ohio Railway Company, Petitioner.

J. M. PERRY,
For the Petitioner.
Staunton, Virginia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR PETITIONER.

I.

The Opinions of the Courts Below.

No opinion was delivered by the Supreme Court of Appeals of Virginia in entering its judgment here under review on March 21, 1929, affirming, by a divided court, the judgment of the Circuit Court of Alleghany County.

That Court delivered an opinion with a judgment in the case entered January 19, 1928, but it afterwards reheard and set aside the judgment by order entered June 25, 1928 (Rec., p. 187). The opinion referred to was not officially reported or printed in any unofficial reporter. It appears at p. 163 of the record here.

II.

The Jurisdiction of This Court.

1. The date of the judgment to be reviewed is March 21, 1929 (Rec., p. 183), affirming, by a court equally divided in opinion, a judgment of the Circuit Court of the County of Alleghany, Virginia, in favor of the respondent, plaintiff below, against the petitioner for $8,000. damages (Rec., p. 26).

2. The specific claims advanced, and rulings made, in the said Supreme Court of Appeals of Virginia, which are relied upon as the basis of this Court's jurisdiction, are:

In its petition to the Supreme Court of Appeals of Virginia upon which a writ of error to the judgment of the Circuit Court of Alleghany was awarded, petitioner's first assignment of error was (Rec., p. 4):

> "The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the

> intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

In its petition for a rehearing, upon which the judgment of January 19, 1928, was set aside, your petitioner again urged the said assignment of error (Rec., pp. 181, 180), and that:

> "Under the evidence and opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interestate commerce, and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission and omission negligently done, and your petitioner submits that it has been deprived in this respect of its rights and immunities under said Federal statute."

Although the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia by a divided court and without opinion, a controlling Federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to defeat any recovery (Rec., pp. 22, 161); the proof was that it was engaged in interstate commerce and that the work being done by the intestate just

before his injury was interstate in character (Rec., pp. 138, 87-88) and its assignments of error in the state court explicitly set up its immunity under said Federal act (Rec., pp. 4, 181).

The judgment of the Supreme Court of Appeals of Virginia was against the right, privilege or immunity under the Federal statute assured to and so claimed by your petitioner, and was in conflict, it is believed, with the decisions of this Court in the following cases:

Bountiful Brick Co. v. Giles, 276 U. S. 154, 158;

Erie R. Co. v. Winfield, 244 U. S. 170, 173;

Davis v. Green, 260 U. S. 349;

Atlantic Coast Line R. Co. v. Southwell, 275 U. S. 64.

3. The Chesapeake and Ohio Railway Company filed its petition for a writ of certiorari under the provisions of sec. 237 of the Judicial Code as amended by the Act of February 13, 1925, United States Code, sec. 344 (b), and said petition was granted by this Court June 3, 1929.

4. The following cases are believed to sustain the jurisdiction of this Court:

Toledo St. L. & W. R. Co. v. Slavin, 236, U. S. 454;

St. Louis I. M. & S. R. Co. v. McWhirter, 229 U. S. 265;

Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573;

Johnson v. Risk, 137 U. S. 300;

North Carolina R. Co. v. Zachary, 232 U. S. 248;

Davis v. Green, 260 U. S. 349, 352;

Atlantic Coast Line R. Co. v. Southwell's Admr., 275 U. S. 64.

5. The matter of jurisdiction is argued at length in a brief filed by the petitioner opposing the respondent's motion to dismiss for alleged want of jurisdiction, submitted by respondent November 25, 1929, and it is respectfully requested that the argument there submitted by petitioner may be considered here as if fully set forth.

III.

Statement of the Case.

(a) Proceedings in the State Court:

M. L. Bryant's administrator instituted suit against the petitioner in the Circuit Court of Alleghany County, Virginia, for damages for the death of said M. L. Bryant, dec'd, under the Virginia statutes governing liability of railroads to employees and death by wrongful act, which statutes permit a recovery for death caused by wrongful act as well as by negligence (Virginia Code, 1919, secs. 5791, 5786), averring in his declaration that the deceased

was employed by the Railway Company, that when he began his day's work where he was employed to work the petitioner's foreman directed him to stop work and to leave the employment and that when the deceased "did not after he was discharged leave the premises immediately" the foreman shot him (Rec., p. 19). The petitioner by appropriate pleading set up as a defence that it was a common carrier by railroad engaged in interstate commerce, that the plaintiff's intestate was employed in such commerce at the time of the commission of the supposed grievance and that the intestate's injury did not result in whole or in part from the negligence of the petitioner's officers, agents or employees (Rec., pp. 22, 25). Thus the suit became one governed exclusively by the Federal Employers' Liability Act (35 Stat. 65, U. S. Code, ch. 2, sec. 51), of the facts so pleaded were proved.

At the trial of the case it appeared without question that the petitioner was such interstate carrier engaged in interstate commerce and that the deceased immediaely before his injury was doing work of interstate character (Rec., pp. 138, 46, 47, 87-88).

Petitioner demurred to the evidence, especially insisting in its statement of the grounds of its demurrer that petitioner was engaged and the deceased employed in interstate commerce at the time of the deceased's injury, that said injury did not result in whole or in part from negligence and that no cause of action against petitioner had accrued to the plaintiff under the statute governing such

employment and engagement in interstate commerce (Rec., p. 161). The trial court overruled the demurrer to the evidence and gave judgment against the petitioner for $8,000., the damages assessed by a jury, its decision thus being against the right, privilege or immunity under said Federal statute specifically claimed by the petitioner.

Under the Virginia practice the effect of a demurrer to the evidence is: "The party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." Johnson v. C. & O. Ry. Co., 91 Va. 171, 174; A. C. L. R. Co. v. Wheeler, 147 Va. 1, 17. The Court, however, is not obliged to accept as true what it knows judicially to be untrue. N. & W. R. Co. v. Strickler, 118 Va. 153, 155. Nor does the demurrant admit any forced or illogical deductions from the testimony. Hicks v. Romaine, 116 Va. 401, 411. And a demurrer to the evidence does not waive an objection to illegal or incompetent evidence, admitted over the demurrant's motion to exclude. N. & W. R. Co. v. Warden, 117 Va. 801, 804.

The Supreme Court of Appeals of Virginia awarded a writ of error to the judgment. On January 19, 1928, that Court affirmed the judgment of the trial court (Rec., p. 176), delivering an opinion

(Rec., p. 163). By order entered on June 25, 1928, the Court reheard and set aside its said judgment of affirmance (Rec., p. 187).

On March 21, 1929, the Supreme Court of Appeals of Virginia being "equally divided in opinion as to the judgment to be entered in the premises" (Rec., p. 188), affirmed the judgment of the Circuit Court of Alleghany County, but delivered no opinion.

(b) Summary Statement of Facts:

The deceased had been employed by petitioner for several years as a section laborer. Dodson, who shot him, was a section laborer working in the same force, who was temporarily acting as foreman in the place of Long, petitioner's regular foreman, who had been called away and with the consent of his superior had placed Dodson in charge of the work then being done and the force of hands then doing it (Rec., p. 145). The duties of a section foreman were to maintain the track and right of way (Rec., p. 141) and he had no authority to police or guard the railroad tracks against trespassers (Rec., p. 147). The work being done was changing the tracks of the main line, putting in new ties and surfacing (Rec., p. 145) and that to be done on the day of the shooting was laying rails (Rec., p. 88).

On the Monday morning of the shooting the section force had brought their lever car from petitioner's tool house, had placed it on the main track and were loading their tools on it (Rec., pp. 45-47).

The intestate began work, going to the tool house to bring out tools (Rec., pp. 57-58, 103-104). As he went the foreman, Dodson, said, "I ain't going to work you any more" (Rec., p. 103), or, "Fellow, I don't need you any longer" (Rec., p. 46). The intestate evidently did not hear or did not understand, but went into the tool house, brought out tools and placed them on the lever car (Rec., pp. 46, 103). Dodson then repeated, "I don't need you any longer," to which the intestate replied, "I am due to get my money in six hours after I quit," and, "I will go to see Mr. Long," who was the regular foreman (Rec., pp. 46, 53, 58, 67). Dodson then said, "I have just fooled with you long enough, you get away from here," drew a pistol and aimed it at the intestate (Rec., pp. 46, 53, 58, 67, 104), who said, "What are you going to do with that?" "I am going to make you eat it" (Rec., pp. 46, 53, 68, 104). The intestate did not attempt to attack the foreman, had nothing in his hands, made no effort to draw any weapon and made no advance towards the foreman, but was shot in his tracks (Rec., pp. 48, 58-59, 104-105). Dodson's firing commenced when the intestate said that he would make Dodson eat the pistol (Rec., pp. 46, 53, 55, 68). The whole thing happened very quickly (Rec., pp. 72, 104).

This was on Monday. On the previous Saturday afternoon Bryant threatened to beat Dodson, the latter deposed, and Dodson said, "Remember after this evening I don't work you any more," to which Bryant replied, "If you cause me to lose my job I will kill you" (Rec., p. 82). An hour or more

afterwards at quitting time on Saturday Foreman Dodson said to the intestate, "If you keep on yapping around here you won't have anything to do" (Rec., p. 61). As the deceased went to work on Monday morning he told a friend that he expected to be dismissed by Dodson that morning (Rec., pp. 118-119). In the same deposition Dodson testified that he discharged Bryant on Saturday (Rec., p. 85), but this was only the witness' conclusion from the facts above set out, was objected to by petitioner on this ground, the objection was overruled and exception was taken.

IV.

Specification of Errors.

1. The Supreme Court of Appeals of Virginia erred in affirming the said judgment and thus in effect holding, (a) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the employee's work there is finished, does not exist if the employee is leaving the work permanently, or (b) that such necessary incident of the employment does not partake of the interstate character of the work being done.

2. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the pleadings and proof in this case the intestate was not employed in interstate commerce at the time of his injury, and that

the petitioner's relations to the intestate were not governed exclusively by the Federal Employers' Liability Act.

3. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the Federal Employers' Liability Act the respondent may recover damages against your petitioner for the wrongful death of the intestate at the hands of another employee.

V.

SUMMARY OF THE ARGUMENT.

Point (a) Although petitioner's employees were merely loading tools upon a lever car presently to be taken to and used in work upon the main line of an interstate carrier ,this was employment interstate in character, although the actual work of laying rails had not begun.

Point (b) A carrier's employee, upon his dismissal while at work, is entitled to a reasonable margin of time necessary to be used in passing from the carrier's premises where his work is being done, during which the duties of master to servant persist.

Point (c) Such incident of the employment partakes of the interstate character of the work then being done, and the Federal Employers' Liability Act applies.

Point (d) The deceased, discharged, was wilfully wounded before he could leave, while his status as to the petitioner was that of employee.

Point (e) The carrier is not liable under said Act for damages for a wrongful, not negligent, injury inflicted upon such interstate employee.

VI.

ARGUMENT.

Point (a) Although petitioner's employees were merely loading tools upon a lever car presently to be taken to and used in work upon the main line of an interstate carrier, this was employment interstate in character, although the actual work of laying rails had not begun.

New York Central R. Co. v. Winfield, 244 U. S. 147;

New York Central R. Co. v. Porter, 249 U. S. 168;

Kinzell v. C. & St. P. R. Co., 250 U. S. 130;

Pedersen v. D., L. & W. R. Co., 229 U. S. 446.

Point (b) A carrier's employee, upon his dismissal while at work, is entitled to a reasonable margin of time necessary to be used in passing from

the carrier's premises where his work is being done, during which the duties of master to servant persist.

Erie R. Co. v. Winfield, 244 U. S. 170, 173.

Bountiful Brick Co. v. Giles, 276 U. S. 154, 158.

While the decision of this Court in the case of Erie R. Co. v. Winfield, supra, was in the case of an employee who had completed his work, not because he was discharged but because the day was ended, the principle enunciated cannot be affected by the employee's reason for leaving. It is applicable where work is not to be resumed, whether because of a discharge while at work, or because the task for which the laborer is hired is completed, or where the employee expects to return after his night's rest. The very necessity of the case is the reason for this incident of the employment. The workman finds himself on the master's premises where his employment has required his presence. The reasonable opportunity to leave must have been contemplated by both employer and employee in the inception of the contract of employment.

Point. (c) Such incident of the employment of the deceased partook of the interstate character of the work then being done, and the Federal Employers' Liability Act applied.

This incident of the employment, the right to a reasonable margin of time necessary to be used in passing from the petitioner's premises where the work was being done and the discharge was effected, partook of the character of the work done that day, the making of repairs to and maintaining the interstate carrier's main line, and the intestate's employment necessarily was in interstate commerce.

In Erie R. Co. v. Winfield, 244 U. S. 170, where an interstate employee had taken his engine to the place where it was to remain for the night and while going over the yard tracks on his way home from the premises was struck by an engine and injured, the Court said (p. 173):

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was not more an incident of one part than of another."

Point (d) The deceased, discharged, was wilfully wounded before he could leave, while his status as to the petitioner was that of employee.

The facts as testified to by eye witnesses, all testifying on behalf of the respondent, were that the deceased's discharge and the shooting were almost simultaneous. "There wasn't merely a moment, you might say" (Rec., p. 82). "The whole transaction happened very quickly" (Rec., p. 72). The foreman first said, "I don't need you any longer" (Rec., p. 46), "I ain't going to work you any more" (Rec., p. 103), and the intestate did not hear or understand him, but went into the tool house, brought out tools and placed them on the lever car (Rec., pp. 46, 103). The foreman then repeated, "I don't need you any longer," to which the intestate replied, "I am due to get my money in six hours after I quit," and, "I will go to see Mr. Long," who was the regular foreman (Rec., pp. 46, 53, 58, 67). The foreman then said, "I have just fooled with you long enough, you get away from here," drew a pistol and aimed it at the intestate (Rec., pp. 46, 53, 58, 67, 104), who said, "What are you going to do with that?" "I am going to make you eat it" (Rec., pp. 46, 53, 68, 104), but the deceased made no attempt to attack the foreman, had nothing in his hands, made no effort to draw a weapon and made no advance towards the foreman.
(Rec., pp. 46, 53, 68, 104). Thereupon he was shot, the shooting commencing when the intestate said that he would make Dodson eat the pistol (Rec., pp. 46, 48, 53, 55, 58-59, 68, 104-105).

Point (e) The carrier is not liable under said Act for damages for a wrongfful, not negligent, injury inflicted upon such interstate employee.

The intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees, but from a wilful wrong, and there can be no recovery under the Federal Employers' Liability Act for an injury so inflicted.

Davis v. Green, 260 U. S. 349;
Atlantic Coast Line R. Co. v. Southwell's Admr., 275 U. S. 64.

Upon the evidence the deceased, an employee of years' standing (Rec., p. 143), was actually doing the work that he had been employed to do when petitioner's acting foreman told him that he did not need him any longer and then wantonly shot him. The deceased believed he was an employee, for a few minutes before, as he came to work, he said to the witness E. C. Thompson, after a short conversation, "Well, I will go down, I guess Dodson will fire me this morning" (Rec., p. 119), and when Thompson asked the reason, the deceased replied that "Dodson had been talking about him, and he told him if he didn't quit talking about him that one or tother of us would have to take a whipping." The foreman who shot him believed he was still an employee, for on the previous Saturday evening at quitting time, hours after the supposed discharge insisted upon by respondent, Foreman Dodson said

to the deceased (Rec., pp. 57, 61), "If you keep on yapping around here you won't have anything to do," and the deceased said nothing, continuing with his work—"He never raised up" (Rec., p. 61)—this was the foreman's last previous communication to or with Bryant.

There was no negligent act or omission whatever on the part of any officer, agent or employee of the petitioner.

Conclusion.

It is respectfully submitted that the Supreme Court of Appeals of Virginia has decided a Federal question of substance in its affirmance of the judgment here complained of, and has decided it in a way not in accord with applicable decisions of this Court.

Accordingly the judgment of the State court should be reversed.

Respectfully,

J. M. PERRY,
Counsel for The Chesapeake and Ohio Railway Company, Petitioner.

Staunton, Virginia.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

Supplemental Brief for the Chesapeake & Ohio Railway Company, Petitioner.

J. M. PERRY,
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Staunton, Virginia.

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SUPREME COURT OF THE UNITED STATES

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R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable, the Supreme Court of the United States:

The undersigned, counsel for The Chesapeake & Ohio Railway Company, petitioner, respectfully

prays leave to file the following supplement to the brief on the merits heretofore filed for the petitioner, touching certain matters appearing in the brief filed for the respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

I.

Preliminary Statement

In the brief for the respondent upon the merits under the heading, "Was Dodson an unfit and dangerous person to be placed in charge of defendant's section force?" (Respondent's Brief, pp. 29-34, inclusive), and again under the heading, "Defendant's sole reliance for reversal is that this case is governed by the Federal Employers' Liability Act" (Respondent's Brief, pp. 43-44), the respondent insists that the judgment in this case should be sustained under the Federal Employers' Liability Act (United States Code, Ch. 2, sec. 51) upon the second count of the respondent's declaration (Rec., p. 20). Because of the cases cited below and for the reason that the evidence so manifestly failed to support the averments of that count of the declaration, counsel for the petitioner disregarded it and that aspect of the case was not discussed in the petitioner's brief.

II.

Statement as to the Second Count of the Declaration

The second count of the respondent's declaration (Rec., p. 20) averred that the petitioner negligently employed as its foreman an unfit and dangerous person who "was liable in a fit of anger and passion to injure or kill any one of defendant's servants working under said foreman, or after being discharged by him," and that said foreman directed the deceased, petitioner's employee, to leave the work and employment and thereupon shot him, and charged that the deceased's death was caused by the petitioner's negligence in employing and keeping in its service a foreman who was unfit and a dangerous person to be in charge of its section hands.

III.

Summary Statement of Facts Touching the Averments of the Second Count of the Declaration

The respondent's brief (pp. 29-33) refers to and quotes certain testimony of respondent's witnesses that petitioner's acting foreman, Dodson, was a nervous, irritable man, quick tempered and hard to get along with, but omits to state that the very witnesses thus referred to further testified that they had never known Dodson to be involved in a personal difficulty and had never heard of him having

a fight (Rec., p. 131, Samuel J. Wright; pp. 106-7, W. M. McDowell; p. 114, Frank Alfred; pp. 133-4, E. C. Thompson).

Acting foreman Dodson was not a "fighting man" (Rec., p. 114), had never struck a man (Rec., p. 133), had no fights (Rec., pp. 134, 114) and no difficulty with any of the men, either on or off of the work (Rec., p. 114), so far as the witnesses referred to had observed or heard. There was no evidence to the effect that Dodson was vicious or dangerous.

The respondent's brief, without referring to the record, states that Dodson, with his employer's knowledge, carried a pistol and went about armed (Respondent's Brief, pp. 33, 34). The only evidence in the record upon the point is that of Long, foreman, who testified (Rec., pp. 147, 148, 157) that while Dodson was working as night watchman at a certain tunnel, during the winter preceding the shooting, he carried a pistol; that this was "when he was not in charge of any body of men" (Rec., p. 147), The statement referred to is not supported by the record.

IV.

Argument

In the case of Davis v. Green, 260 U. S. 349, the ground upon which the state court had held the carrier liable was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of this

man's employment. It appeared (125 Miss. 476) that this employee, an engineer, already had killed a man and had the general reputation of being a dangerous, quarrelsome, and violent man. The Court said (p. 351):

> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."

In the case of Atlantic Coast Line R. Co. v. Southwell, 275 U. S. 66, the plaintiff sought to recover against the carrier for its failure to prevent

the shooting of Southwell by its employee, Dallas, who, with the carrier's knowledge, was armed and had had a previous difficulty with Southwell, and the State court had upheld a judgment in his favor (191 N. C. 153). The Court, in disposing of this theory of liability, said (p. 65):

> "It would be straining the language of the act somewhat to say in any case that a wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case at all events we are of opinion that there was no evidence that warrants such a judgment. It is not necessary to state the facts in detail. . . . The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this. See St. Louis-San Francisco R. C. v. Mills, 271 U. S. 344."

It is submitted that in the light of these authorities as well as because of the absence of any proof of negligence on the part of the petitioner, there can be no recovery under the second count of respondent's declaration.

V.

In reply to the charge in respondent's brief (Respondent's Brief, p. 8), that statements in the petitioner's brief are misleading and not according to the evidence in the record:

In each instance statements of fact in the petitioner's briefs are supported by references to the record. There they may be verified.

The petitioner's statement of the facts of the case has been consistent with the Virginia rule as to the effect of a demurrer to the evidence. The only testimony in the record as to occurrences when the deceased was shot, and as to what happened between the deceased and acting foreman Dodson on the Saturday preceding the Monday of the shooting, is that of the laborers who were present when the shooting occurred and of Dodson, who killed the deceased, all witnesses introduced by and testifying for the respondent, plaintiff below. All of the evidence of these witnesses, as well on their cross-examination as in chief, is to be considered in determining the facts proved. Ware v. Stephenson, 10 Leigh (37 Va.), 155; Horner v. Speed, 2 Pat. & H. (Va.), 616. The evidence of the witness is to be considered as a whole, and not detached statements only. Norfolk & W. R. Co. v. Holmes, 109 Va. 407. And, as was said in Hicks v. Romaine, 116 Va., 401, 411, while a party demurring to the evidence

"is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, he does not admit any fact not proven by the evidence, nor does he admit any forced or illogical deductions from the testimony.

"In Hansbrough v. Thorn, 3 Leigh (30 Va.), 156, the opinion by Tucker, J., uses the following language entirely pertinent to the case here in judgment: 'I will observe, before I proceed to pronounce on the particular case before us, that I think the expression " that the demurrant must admit, or is considered as admitting, every fact which the evidence may conduce to prove, " must not be understood too broadly. The language of this court is more appropriate " that the demurrant must be considered as admitting all that could reasonably be inferred by a jury from the evidence against him. " For evidence may conduce, that is, tend or contribute towards the proof of a fact which it is very far from establishing and which could not be fairly inferred from it.' "

VI.

In the brief filed for the petitioner counsel endeavored to state and argue the case fully. Now to reply to the discussion of the evidence contained

in the respondent's brief would be merely reiterating the substance of the petitioner's brief, upon which the petitioner places full dependence.

Respectfully submitted,

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